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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-878

WARREN DALE KEEFER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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1

The judgment of conviction imposed upon Petitioner by the Superior Court of the State of California for the County of Santa Barbara was affirmed in a Mimeo Opinion of the California Court of Appeal, Second Appellate District, Division Three. The Opinion of the Court of Appeal is voluminous and, accordingly, is separately

presented.

2

Judgement of conviction was imposed by the Santa Barbara County Superior Court on November 3, 1975. The Court of Appeal affirmed the judgment of conviction on August 24, 1977, and denied a Petition for Rehearing on September 22, 1977. The California Supreme Court denied a hearing on November 17, 1977. The Court of Appeal issued its Remittitur on November 30, 1977.

3

Jurisdiction over this case is conferred on this Court by 28 U.S.C. §1257(3). Petitioner's conviction was affirmed by the highest Court of the State of California required to hear Petitioner's appeal, and the Supreme Court of the State of California, which had discretionary power to hear Petitioner's appeal, refused to

grant a hearing.

SUMMARY OF CHARGES ON WHICH
PETITIONER WAS CONVICTED

4

Petitioner was convicted of four counts of Grant Theft by False Pretenses in violation of California Penal Code §§ 484 (Theft defined) and 487.1 (Grand theft defined). Two of the counts (Counts I and II) were based upon statements allegedly made by Petitioner to lending institutions while acting as agent for purchasers in real property transactions, to facilitate loans sought by said purchasers. The remaining counts (Counts V and VI) were based upon statements allegedly made by Petitioner, acting as agent for parties involved in real property transactions, to facilitate the sale of trust deeds.

QUESTION PRESENTED

I

Five days prior to trial, without notice to Petitioner, Petitioner's "own recognizance" release status was revoked and bail of $500,000.00 was imposed. Petitioner, unable to post bail, remained in custody during trial. The question presented by this Petition is whether said action constituted the imposition of excessive bail in violation of the Eighth Amendment and/or deprived Petitioner of effective representation by counsel in violation of the Sixth and Fourteenth Amendments.

PETITIONER'S CONTENTION WAS PROPERLY
RAISED IN THE STATE COURTS

5

The contention that revocation of Petitioner's "own recognizance" status and

imposition of excessive bail violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights was advanced during trial pursuant to a motion for reduction of bail [C.T.715-721], on appeal [App. Op. Br.75-79; App. Rep. Br.28-30; Pet. Rehearing 14-15], and in a Petition for Hearing denied by the California Supreme Court. [Pet. Hearing 40-45]

The Court of Appeal held that Petitioner had "not shown that the mere fact he was in custody during trial adversely affected the outcome of the case." [Mimeo Op.95]

ARGUMENT

I

REVOCATION OF PETITIONER'S "OWN RECOGNIZANCE" STATUS AND THE SETTING OF EXCESSIVE BAIL, WITHOUT NOTICE, IMMEDIATELY PRIOR TO TRIAL, CONTRAVENED FUNDAMENTAL RIGHTS ACCORDED TO PETITIONER BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

The indictment herein was filed on June 26, 1975. Petitioner was arraigned on June 27, 1975, and was released on his own recognizance pending a hearing on his application to be released on his own recognizance. [C.T.9] On July 8, 1975, Petitioner's application to be released on his own recognizance was granted. [C.T. 569]

On October 1, 1975, the day on which a trial date was to be set, the People moved for an order revoking Petitioner's "own recognizance" status and setting bail pursuant to California Penal Code §1318.6.[1] [C.T.673-703] The People alleged that facts had come to the People's attention indicating that Petitioner had engaged in other criminal activities before and after his indictment "which facts

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[1] California Penal Code §1318.6 provides that:

> "After a defendant has been released pursuant to this article [own recognizance], the court in which the charge is pending may, in its discretion, require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter. The court may order that the defendant be committed to actual custody unless he gives such bail or gives such other security."

represent a change in circumstances which substantially increase the risk of the said defendant's failure to appear and attend upon further proceedings in court in this matter." [C.T.673] The People's motion specifically alleged:

> "From the facts at hand, it appears that the defendant has fraudulently obtained, or has attempted to obtain by fraud, amounts of money ranging from $50,000 to in excess of $200,000 within the past few months, and that it may be his intention to flee this jurisdiction with whatever money he has obtained or may yet obtain before a judgment is rendered in the criminal charges now pending against him in this court."

[C.T.678 (Emphasis added)]

The Court granted said motion, fixed bail at $500,000.00, and remanded Petitioner to the custody of the Santa Barbara County Sheriff. Trial of the matter was set for October 6, 1975. [C.T.704]

On October 10, 1975, during the course of trial, Petitioner moved for a reduction in the amount of bail. [C.T.715-721] The declaration of Petitioner's trial counsel in support of said motion stated:

> "It is respectfully urged that bail should be substantially reduced for the following reasons:
>
> "1. Defendant voluntarily appeared at his arraignment and for booking by the County Sheriff.

> "2. Following his release on his own recognizance the defendant has made all required court appearances and additional court appearances not required of him by the court.
>
> "3. The defendant's prior record consists of only one misdemeanor conviction and would not suggest any motivation for the defendant to flee the Court's jurisdiction.
>
> "4. The defendant has cooperated throughout these proceedings with his counsel.
>
> "5. The defendant's present custodial status, particularly in a trial requiring close cooperation between the defendant and his counsel because of the number of documentary exhibits involved, makes

the preparation of the defendant's defense prejudicially difficult. Interview facilities at the County Jail where the defendant is incarcerated are very poor and prohibit the exchange of documents between the defendant and his counsel. Moreover, the conduct of the trial severely limits the time available to defendant to meet with his attorney in light of defendant's custodial status.

"6. The alleged crimes involved are not crimes of violence and do not suggest danger to any persons, should the defendant's bail be reduced and should he be able to make bail.

"7. The bail presently set is such as to totally preclude any

practical possibility of the defendant meeting the bail, defendant's finances being severely limited and he counting on help from his family to meet whatever bail may be set.

"8. The defendant has been the primary person caring for his elderly mother, having resided with her for some time, in order to care for her. Defendant's mother has been hospitalized during the last number of days and may still be hospitalized. Moreover, defendant's elderly father was hospitalized within the past several days for surgery, but in the course of such surgery suffered a stroke and as a result thereof is presently understood to be in intensive

care in the Los Robles Hospital, Thousand Oaks, California."

[C.T.718-719]

On October 13, 1975, the sixth day of Petitioner's trial, the Court heard argument by counsel on Petitioner's motion to reduce the amount of bail. [C.T.722; R.T.751-757] Petitioner's counsel noted that Petitioner resided in Westlake,[California] and that Petitioner had conducted business in the area for many years. [R.T.752] Counsel then reiterated the effect of Petitioner's custodial status upon preparation of Petitioner's defense:

". . .[A]s your Honor can readily see from what has gone on before us now in approximately a week of trial, this is an extremely complicated matter. It involved four counts, and I don't know

how many transactions for each count. I can assure the Court that it's very, very difficult, without considerable help from one's client, to put these transactions together. I can see that that would not be a reason for releasing a defendant where there are substantial reasons suggesting a risk or danger or what have you; but it seems to me that where the risk or danger of the defendant fleeing is as minimal as I see it to be here, the Court should consider the right of the defendant to be afforded every opportunity for the most expansive contact with his counsel." [R.T.754]

Petitioner's motion for reduction of bail was denied. [C.T.22; R.T.757] Petitioner was remanded to custody in lieu of bail, and Petitioner's counsel did not thereafter confer with Petitioner at the County jail. [R.T.2557]

On December 16, 1975, Petitioner's application for probation was denied and Petitioner was sentenced to state prison on each of the four counts, the sentences to run concurrently. [C.T.927] On the same day Petitioner filed Notice of Appeal [C.T.932] and moved for an order setting bail on appeal. The trial court declined to rule on said motion, but granted Petitioner's request for a stay of execution of the sentences to December 29, 1975 to permit counsel to file appropriate written motions. [R.T.2579-2580]

On December 31, 1975, Petitioner filed

a Petition for Writ of Habeas Corpus dated December 29, 1975, in the California Court of Appeal, Second Appellate District. [2d Crim. No. 28000] Said Petition was denied on January 7, 1976 without prejudice to Petitioner's right to apply to the trial court for an order granting bail on appeal. Petitioner so moved the trial court and on January 28, 1976, the Superior Court set bail on appeal in the amount of $250,000.00.

On or about February 12, 1976, Petitioner filed a second Petition for Writ of Habeas Corpus in the California Court of Appeal, Second Appellate District. [2d Crim. No. 28159] On February 20, 1976, the Court of Appeal set Petitioner's bail on appeal at $50,000.00. Petitioner was thereafter released on the bail set by the Court of Appeal pending resolution of his appeal.

The Eighth Amendment to the United States Constitution provides the "[e]xcessive bail shall not be required." Pursuant to the Due Process Clause of the Fourteenth Amendment, United States Constitution, the States, as well as the federal government, are prohibited from subjecting criminal defendants to excessive bail. Henderson v. Dutton (5th Cir. 1968) 397 F.2d 375, 377 fn. 3; Mastrian v. Hedman (8th Cir. 1964) 326 F. 2d 708, 711, cert. denied, 376 U.S. 965; Pilkinton v. Circuit Court (8th Cir. 1963) 324 F. 2d 45, 46: see Robinson v. California (1962) 370 U.S. 660, 666; Stack v. Boyle (1951) 342 U.S. 1; White v. Wilson (9th Cir. 1968) 399 F. 2d 596, 598.

Although the question of whether the Eighth Amendment impliedly guarantees a right to bail has not been definitively

resolved,[2] it is clear that where a statutory right to bail exists, bail in an amount greater than that necessary to assure appearance is excessive. Stack v. Boyle (1951) 342 U.S. 1, 5; Carlson v. Landon (1952) 342 U.S. 524,544-546.

Article 1, Section 12 of the California Constitution provides that "[e]xcessive bail may not be required," and provides, inter alia, an absolute right to bail "except for capital crimes." California Penal Code Section 1271 implements the foregoing Constitutional imperative by providing that "[i]f the charge is for any [offense other than a capital offense], he may be admitted to

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[2] See Carlson v. Landon (1952) 342, U.S. 524,; United States v. Motlow (7th Cir. 1926) 10 F. 2d 657; Trimble v. Stone (D.D.C. 1960) 187 F. Supp. 483, 484; Note Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1494.

bail before conviction, as a matter of right."

Where a California criminal defendant has been released on his own recognizance (see California Penal Code Section 1318),

> ". . . the court in which the charge is pending may require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter upon a finding, made in open court that the defendant has failed to appear or has violated any condition of the order releasing him on his own recognizance, or that there has been a change of circumstances which increases the risk of failure to appear, or that additional facts have been presented which were not shown at the time of the original order releasing the defendant on his own recognizance. The court may order that the defendant be committed to actual custody unless he give such bail or gives such other security." (P.C. §1318.6)

Applicable considerations in determining the amount of bail are: (1) The seriousness of the offense charged; (2) the previous criminal record of the

defendant, and (3) the probability of his appearing at trial. California Penal Code Section 1275. Although fixing the amount of bail rests with the discretion of the trial court, the exercise of that discretion must be overturned where the facts demonstrate that said discretion has been abused. Stack v. Boyle (1951) 342 U.S. 1, 6; see People v. Norman (1967) 252 Cal App. 2d 381.

Petitioner respectfully submits that the Superior Court set excessive bail so as to violate Petitioner's Constitutional right that excessive bail not be set and, moreover, so as to effectively deprive Petitioner of his Constitutional right to adequate representation of counsel. Bitter v. United States (1967) 389 U.S. 15; see People v. Brown (1960) 184 Cal. App. 2d 588.

In the instant case, Petitioner's prior criminal record clearly did not justify $500,000.00 bail. Petitioner's trial counsel represented that it consisted of one misdemeanor conviction [C.T. 718], and the People presented no contrary evidence.

Likewise, the extraordinary amount of bail was not justified by the seriousness of the charged offenses. Perusal of the facts set forth by the California Court of Appeal [Mim. Op. 3-60] demonstrates that although the charged offenses were felonies, they did not entail violence, but were rather highly technical crimes against property. Moreover, the seriousness of the offense charged is relevant only to the likelihood that a defendant will make required court appearances: "[t]he purpose of bail is not to punish

the defendant nor to protect the public safety, but to assure his presence in Court. . . People v. Gilliam (1974) 41 Cal. App. 3d 181, 191; see U.S. v. Leathers (D.C. Cir. 1969) 412 F. 2d 169; In re Underwood (1973) 9 Cal. 3d 345.

There remains only one possible proper justification for $500,000.00 bail - that it was required to assure Petitioner's presence at trial. Stack v. Boyle, supra; In re Underwood, supra. The People argued that because Petitioner allegedly was committing other crimes while released on his own recognizance, the risk that he would fail to appear at trial was substantially increased. [C.T. 673-674] Plainly, this is a non-sequitur.

The only arguable inference is that Petitioner was allegedly committing fraudulent acts in order to obtain money. It cannot reasonably be further inferred

that Petitioner would use any monies so obtained to flee the jurisdiction. Indeed, the opposite inference is equally likely: If Petitioner found that he could readily defraud persons in California, there would be no reason for him to go elsewhere. It is also equally likely that Petitioner would utilize any monies so obtained to pay his and his family's living expenses and/or his undoubtedly substantial attorneys fees. As was said in Savarese v. State Farm Ins. Co. (1957) 150 Cal. App. 2d 518, 520:

> "Of course, the building of inference upon inference may often result in a progressive weakening of a logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven. Where an ultimate inference is thus remote from the evidence, it should be rejected." See also, Witkin, California Evidence (2nd Ed.), pp. 1053-1054.

The extraordinary amount of the bail imposed - $500,000.00 - lends further support to Petitioner's position: There was simply no evidence that such an amount was necessary to dissuade Petitioner from leaving the jurisdiction. Even the People's obviously inflated estimate was only that Petitioner "[had] fraudulently obtained, or [had] attempted to obtain by fraud, amounts of money ranging from $50,000 to in excess of $200,000 . . . " [C.T. 678] A fortiori, the amount of bail necessary to dissuade Petitioner from leaving the jurisdiction would certainly have been no more than $200,000.00.

"It is also significant that, after conviction, when the probability of flight was presumably at its maximum "(United States v. Allison (9th Cir. 1969) 414 F. 2d 407, 414), the Superior Court set bail

on appeal in the amount of $250,000.00, and the Court of Appeal thereafter reduced the amount of bail on appeal to $50,000.00. [p. 16, supra] "There is nothing to indicate why this less drastic action would not have sufficed during trial. [Citiation omitted]" United States v. Allison, supra, 414 F. 2d at 414.

Moreover, the facts available to the Court demonstrated a likelihood that Petitioner would appear at trial. Petitioner had been arraigned on June 27, 1975, had been in court on several occasions thereafter, both when required to be and when not so required, and had hired an attorney, presumably paid him, and cooperated with him. [C.T. 718] By October 1, 1976, over three months had elapsed since the arraignment and it was a scant five days before trial was to commence. This

conduct surely does not suggest an intention not to appear at trial.

The conclusion is inescapable that the Court set bail at $500,000.00 in order to keep Petitioner in jail and prevent him from committing crimes such as those alleged at length by the People. [C.T. 673-703] Such purpose was not only incompatible with the theory that crimes should be deterred by the threat of subsequent punishment rather than by prior confinement, but was clearly violative of the Eighth Amendment. Stack v. Boyle (1951) 342 U.S. 1; In re Underwood (1973) 9 Cal. 3d 345.

An important purpose of the Bail Clause of the Eighth Amendment, and statutes enacted pursuant thereto, is that of permitting "the unhampered preparation of a defense, . . . "Stack v. Boyle (1951)

342 U.S. 1, 4. Detention prior to and/or during trial seriously impedes the ability of a defendant to prepare his case.[3] Thus, in Bitter v. United States (1967) 389 U.S. 15, the United States Supreme Court summarily reversed the judgment of conviction, holding that the order of the trial judge remanding the defendant to custody for the duration of his trial after defendant was tardy in returning to court "constituted an unwarranted burden upon defendant and his counsel in the conduct of the case." Bitter v. United States, supra, 389 U.S. at 17. The Court did not inquire whether prejudice resulted from the improper commitment order.

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[3]See U.S. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 70-71; Note, a Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 693, 725; Note, Compelling Appearance in Court: Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031, 1054-1058.

In the instant case, the record demonstrates that Petitioner's defense was severely prejudiced by the imposition of exorbitant bail. Cf. United States v. Stroud (9th Cir. 1973) 474 F. 2d 737, cert. denied 412 U.S. 930; United States v. Allison (9th Cir. 1969) 414 F. 2d 407. In this case involving scores of witnesses and hundreds of exhibits, close consultation between Petitioner and counsel was obviously essential. It was the expectation of Petitioner and his trial counsel, as would be the normal practice in a complex case, that they would meet each evening after trial to review the evidence and organize the defense. [R.T. 2455] When a mere five days before trial, without warning, this expectation was thwarted, the lines of communication between Petitioner and his attorney were severed.

[C.T. 719; R.T. 2456-2457] As a result, Petitioner was deprived of effective representation of counsel.

Incongruously, the Court of Appeal disposed of the foregoing contention in one sentence: "Appellant has not shown that the mere fact he was in custody during trial adversely affected the outcome of the case. (People v. Brown, 184 Cal. App. 2d 588, 596.)" [Mim. Op. 95]

Petitioner respectfully submits that the substantial constitutional issues advanced herein are deserving of consideration beyond that accorded by the Court of Appeal.

The case relied upon by the Court of Appeal, People v. Brown, supra, contains only two sentences on the subject and no discussion of the particular circumstances wherein Brown may have been prejudiced by

his incarceration awaiting trial. Moreover, Brown did not seek a bail reduction and the amount of his bail does not appear in the record. Furthermore, Brown involved a relatively simple marijuana case rather than the complex multi-exhibit litigation here. It is quite clear in the instant case that Petitioner was prejudiced. His trial attorney so stated under oath. [C.T. 719] Common sense compels the conclusion that prejudice occurred.

In addition, the Court's notion that Petitioner had to show that the excessive bail "adversely affected the outcome of the case" was faulty. People v. Brown, supra at 596. This is, once again, plainly a constitutional issue. Petitioner's right not to be the subject of excessive bail requirements is explicitly protected by both state and federal constitutions.

Therefore, Petitioner need not show "probable prejudice" he need only show "possible prejudice." See People v. Spencer (1967) 66 Cal. 2d 158.

Even more basically, this case demonstrates a flagrant abuse of the constitutional bail provisions. The Court's approach leaves Petitioner, and others similarly situated, without any effective remedy where this ancient constitutional right is abused. "Excessive bail may not be required" says our Constitution. Here excessive bail was obviously required. This Court should not sanction this constitutional abuse.

CONCLUSION

A Writ of Certiorari should be issued, directed to the California Court

of Appeal ordering it to vacate its Opinion and reverse the judgment of conviction.

Respectfully submitted,

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